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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-413

HENRY H. KLEIN, M.D.,
Petitioner,

versus

VERNON B. ASTLER, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Counsel for Respondents:
Michael I. Schwartz
SLEPIN AND SCHWARTZ
Suite 201 Ellis Building
1311 Executive Center Drive
Tallahassee, Florida 32301

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IN THE
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OCTOBER TERM, 1977

No. 77-413

HENRY H. KLEIN, M.D.,
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versus

VERNON B. ASTLER, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

The respondents contend that this Court is without jurisdiction as will hereinafter be demonstrated in this brief.

QUESTIONS PRESENTED

The only issue before this Court is:

DOES JURISDICTION VEST IN THIS COURT WHERE THE U.S. DISTRICT COURT, UPON MOTION, DISMISSES COMPLAINT OF DOCTOR WHO FAILS OR REFUSES TO APPLY FOR LICENSURE AND FILES SUIT DEMANDING SAME.

Petitioner's "Questions" are manifestly argumentative, prejudicial to respondents, and constitute an abuse of the rules of appellate procedure.

Petitioner's "Questions" are restated below:

1. Whether the decision of the court below conflicts with the principles enunciated in this court's due process, equal protection, reciprocity and interstate travel decisions.

2. Whether the decision of the court below is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975).

3. Whether the decision of the court below presents a case or controversy and, as such, whether there is anything to be resolved by this court.

STATUTORY PROVISIONS INVOLVED

The following is in addition to those cited by Petitioner:

Sections 458.051(1)(c) and (d), Florida Statutes:

(1) Subject to the provisions herein contained, the board shall issue a license by endorsement to practice medicine in this state to an applicant who submits a sworn application in proper form, together with a fee of $100, demonstrating that he:

(c) Is a graduate of a medical school or college maintaining a standard and reputation approved by the board pursuant to §458.1201;

(d) Has been certified by licensure examination of the Federation of State Medical Boards of the United States, Inc. (FLEX) or is certified by the National Board of Medical Examiners as having completed its examination; provided that said examination required shall have been so certified within the 8 years immediately preceding the filing of his application for licensure under this section.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case is argumentative and draws unfounded conclusions. In pertinent part, petitioner filed a complaint challenging the constitutionality of §458.09, Florida Statutes, providing for examination of applicants for license to practice medicine. Petitioner sought a Declaratory Judgment declaring the "actions" of respondents in denying reciprocity to petitioner and requiring petitioner to take a licensing examination as unconstitutional, illegal, null and void; Declaratory Judgment declaring Florida Statutes, §458.09, unconstitutional, illegal, null and void as applied to the petitioner; Injunction restraining respondents from enforcing §458.09,

Florida Statutes, as it applies to petitioner; Injunction requiring respondents to admit petitioner immediately to the practice of medicine in the State of Florida and the convention of a three-judge federal district court panel.

Respondents, Cole, Martinez, McIntosh, Palmer, Steele, Grossman, Astler, Mendoza, Cheleden and Pope (the last four are no longer members of the Board), as individuals, filed Consolidated Motions to Dismiss. Respondent Florida State Board of Medical Examiners filed a Motion to Dismiss/or Summary Judgment, Motion to Strike, and Motion for More Definite Statement.

A three-judge federal district court panel was convened. The three-judge panel determined that claims alleged in the complaint lacked substantiality and were obviously without merit, whereupon the three-judge panel was dissolved. Senior United States District Judge Mehrtens agreed with the finding of the three-judge panel and granted respondents' motion to dismiss the complaint. Petitioner appealed this decision to the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the complaint by the United States District Court.

Petitioner, Klein, has still not applied for licensure in the State of Florida, by reciprocity, or by any other means authorized by Chapter 458, Florida Statutes.

REASONS FOR NOT GRANTING THE WRIT

I.
The Decision Of The Court Below Does Not Conflict With The Principles Enunciated In This Court's Due Process, Equal Protection, Reciprocity And Interstate Travel Decisions.

A.
Due Process

Petitioner has no constitutional "right" to practice medicine and no right to practice arises under the laws of the State of Florida until petitioner meets the requirements for qualification under §§458.05 or 458.051, Florida Statutes. If petitioner should decide to make application for a license to practice medicine in Florida, he would be entitled to a hearing before his application could be denied. Chapter 120, Florida Statutes; §458.1201, Florida Statutes.

In the instant case, petitioner has not been deprived of any "right" and the "presumption" of incompetence may be overcome either by taking the examination or by proving certification by a national board.

Petitioner also complains that the Florida licensure provisions are not the "least restrictive" methods available, and that the licensure requirements are "overly broad." Petitioner cites cases such as *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein*, 405 U.S. 330 (1972) for the proposition that a state cannot choose the way of greater interference when statutes affect constitutionally protected activities.

The practice of medicine is not a constitutionally protected activity. Furthermore, the petitioner has not even *attempted* to qualify for Florida licensure, and hence, has no "right" to practice in Florida.

Petitioner cites *Cleveland Board of Education v. LaFleur*, 414 U.S. 634 (1974), to support his contention that the State of Florida must utilize the "least restrictive means" available to determine qualifications to practice medicine. As noted, *supra*, this case dealt with irrebuttable presumptions — not at issue in this case — and the *right to procreation*, which is a "constitutionally protected activity."

Further, it should be clearly pointed out that Florida has an alternative to examination which is "less restrictive." It is embodied in §458.051, Florida Statutes, and it is referred to as licensure by endorsement. If an applicant for licensure is a graduate of an approved medical school or college and has been certified by licensure examination by the Federation of State Medical Boards of the United States, Inc. (FLEX) or by the National Board of Medical Examiners within the eight years immediately preceding the filing of his application for licensure, he is eligible for the issuance of a license to practice medicine in Florida by endorsement. This provision is specifically designed to eliminate the examination requirement in Florida when an applicant has already demonstrated his medical competency.

However, it should be strongly pointed out that the petitioner in the instant case has never made any application to the respondent Florida State Board of Medical Examiners.

B.
Equal Protection

In the area of professional regulation, the determination of constitutionality is made by applying the traditional Equal Protection test, *viz.*, the classifications imposed must rationally further a legitimate state purpose or interest.

> [T]he Court gives great latitude to the Legislature in making classifications. Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

United States v. Thorensen, 428 F.2d 654, 658 (9th Cir. 1970). *Cf. Williamson v. Lee Optical*, 348 U.S. 483 (1955).

This Court recently applied the same "rational basis" test in *City of New Orleans v. Duke*, 427 U.S. 297 (1976) which involved an analogous business license of an indiviual. In this case, the Court, at page 303, stated:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and

> rational distinctions may be made with substantially less than mathematical exactitude.

In *Towers v. Kanner*, 260 F.2d 605 (5 Cir. 1958), the plaintiff claimed a constitutional right to be admitted to The Florida Bar without examination. A special rule was repealed that permitted graduates of Florida schools admittance to the Bar without examination:

> With the statute out of the way he *cannot* show that the requirement of a bar examination so prescribed for *all* by the Supreme Court of Florida deprives him of *any* Federally guaranteed right. 260 F2d at 606. (Emphasis added)

The same basic contentions were raised and rejected in *Rasulis v. Weinberger*, 502 F.2d 1006 (7 Cir. 1974). See also *Mercer v. Hemmings*, 194 So2d 579 (Fla. 1967), wherein the Florida Supreme Court required out-of-state practitioners to meet requirements applicable to in-state licensees; *Bevis v. Eastland*, 186 So2d 818 (1 DCA Fla. 1966).

It has already been shown that the State of Florida has a legitimate interest in regulating the practice of medicine in this state. The only line-drawing, or classification, in which the State has engaged has resulted in the requirement that *all* doctors, resident or nonresident, whether or not licensed to practice in any state, either take and pass the Florida medical examination, or prove certification within eight years of application by one of two National Boards. The purpose of this requirement is to insure a uniformly high level of medical care in the State of Florida.

Petitioner's contention that the purpose of the rule is to discourage out-of-state doctors from moving to Florida is not a proper subject for consideration by this Court, even assuming that petitioner has standing to assert this claim. In *Goldsmith v. Pringle*, 399 F.Supp. 620 (D.Colo. 1975), at 627-628, the Court cites with approval the decision of the District Court in *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549, 559 (E.D.Va. 1973) aff'd 414 U.S. 1034 (1973), on this point:

> We are not here concerned with the widsom of the Rule under attack and the Equal Protection Clause does not countenance speculative probing into the purposes of the Rule as long as it is not plainly arbitrary or discriminatory .... Nor need we concern ourselves with the primary or secondary purpose for the Rule. As Mr. Justice Powell said in *McGinnis, supra:*
>
> Yet our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the "distinctions drawn have some basis in practical experience," *South Carolina v. Katzenback*, 383 U.S. 301, 331, 86 S.Ct. 803, 820, 15 L.Ed.2d 769 (1966), or if some legitimate interest is advanced, *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

C.
Reciprocity

The State of Florida has the discretionary power to issue professional licenses by comity (or reciprocity) or to require examination. *Application of Wasserman*, 240 F.2d 213, 215 (9th Cir. 1956); *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549, 559 (E.D.Va. 1973) aff'd. 414 U.S. 1034 (1973); *Goldsmith v. Pringle*, 399 F.Supp. 620 (D.Colo. 1975). The Court of Appeals for the Fourth Circuit made this point very clear in a case involving reciprocity for lawyers:

> The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy; in fact, it is a power in the exercise of which the state has "a substantial interest." . . . To acquire a right to practice in another state one must satisfy the requirements for qualification established by that state. It thus matters not what examinations the applicant has undergone in the state where he is presently licensed; he is still compelled to satisfy reasonable standards for competency and character as fixed by the new state in which he seeks the right to practice unless, under some provision of that state's court rules or statutes, those requirements are excused or dispensed with.

Hawkins v. Moss, 503 F.2d 1191 (4th Cir. 1974) cert.den. 420 U.S. 928 (1975).

The same question of a "right" to a Florida license upon showing licensure in another state was rejected in *Mercer v. Hemmings*, 194 So.2d 579 (Fla. 1967), dismissed for want of a substantial federal question, 389 U.S. 46 (1967). Such a dismissal is a consideration of the merits of the constitutional questions presented. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).

In *Mercer*, the Florida State Board of Accountancy had been statutorily granted the *discretion* to issue reciprocal accountancy licenses. Even with this statute, the Court, at 586, concluded that there was no constitutional "right" for an out-of-state accountant to a Florida license:

> 3. The members of Price Waterhouse are *not* entitled, as a *matter of right*, to the issuance of a reciprocal certificate upon displaying a certificate issued by another state which does not necessarily have the same admission requirements as Florida, but are entitled to a fair and reasonable exercise of the Board's discretion. (Emphasis added)

Petitioner's constitutional assertions would deprive every state of the right to determine the qualifications for practicing a profession. These contentions have been consistently rejected by the Courts as expressed in *Robertson v. California*, 328 U.S. 440 (1946), at 460:

> In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress

would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result.

The alleged refusal of the State of Florida to grant petitioner a license by comity or reciprocity is not unconstitutional but is within the discretionary powers of the State. Moreover, the Florida Medical Practice Act, Chapter 458, Florida Statutes, contains a provision for the granting of a license by "endorsement" to applicants who are certified by licensure examination of the Federation of State Medical Boards of the United States, Inc. or certified by examination of the National Board of Medical Examiners.

D.
Interstate Travel

Petitioner's contention that the Florida licensing procedure impermissably burdens his right to travel from one state to another by making it difficult for him to earn a livelihood in Florida must be considered frivolous since he has also alleged that he moved from New York to Florida and is now a resident of the latter state. Furthermore, as a resident of Florida, petitioner has no standing to complain that he was deterred from moving to Florida.

Hypothesizing the case in which an out-of-state applicant for medical licensure in Florida "hesitates" to move to Florida, the petitioner then discusses a number of cases dealing with durational residency requirements. Nowhere does the petitioner allege that the Florida Statutes he attacks contain a durational

residency requirement, and, in fact, they do not. Instead, petitioner contends that the requirement that out-of-state doctors take an examination before being granted a Florida license "is as unconstitutional as the durational residency requirement struck down in *Shapiro, Dunn,* and *Memorial Hospital.*" *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Dunn v. Blumstein,* 405 U.S. 330 (1972); and *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974).

The essence of the "interstate travel" claims is that it is impermissable to penalize a traveler by subjecting him to less lenient conditions than those to which the resident nontraveler is subjected. E.g., *Dunn v. Blumstein, supra; Sosna v. Iowa,* 419 U.S. 393 (1975). Thus, petitioner's reliance upon the "interstate travel" cases is misguided, since, under Florida law, all persons seeking a license to practice medicine in that state are subject to the same requirements, *viz.* they must either take the Florida examination or present evidence of certification by licensure examination of either the Federation of State Medical Boards of the United States, Inc. or the National Board of Medical Examiners.

Petitioner's attempt to draw an analogy between the Commerce Clause cases and the instant case is similarly without legal or logical basis. The purpose of the Commerce Clause is to promote free trade among the states (which is not at issue in this case) and the power of Congress to legislate under the Commerce Clause does not extend to activity which takes place wholly within a state. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824)

Petitioner cites several other cases in an attempt to find support for his proposition. E.g. *Potts v. Honorable Justices of Supreme Court of Hawaii*, 332 F.Supp. 1392 (D.Haw. 1971), in which the Court found that there was no rational relation between pre-exam residential requirements, which are not required of applicants in Florida, and fitness to practice law. The Court expressly noted that "we need not consider plaintiff's contention that the residency requirements impermissably penalize his constitutional right to interstate travel . . . ." 332 F.Supp. at 1398. In *Keenan v. Board of Law Examiners*, 317 F.Supp. 1350 (E.D.N.C. 1970), the Court held that a 12-month residency requirement before taking the North Carolina Bar was too excessive to withstand attack based upon the right to interstate travel and the right to equal protection.

The case of *Memorial Hospital v. Maricopa County*, *supra*, involved an attack upon the Arizona durational residency requirement for free medical care for indigents. The Court noted that the right to interstate travel was first recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969), another case involving *durational residency requirements*, and a case in which the Court made clear that some waiting-period or residency requirements may not be penalties upon the exercise of the right to interstate travel. The Court went on to discuss the applicable standard by which to test the constitutionality of the requirements, observing that: "The amount of impact required to give rise to the compelling-state interest test was not made clear." 415 U.S. at 256-257.

In a footnote, the Court, in *Memorial Hospital*, *supra*, at 260, Fn 15, suggested that:

> Reference to the tuition cases is instructive. . . . . The District Court in *Starns v. Malkerson*, 326 F.Supp. 234, 238 (Minn. 1970), aff'd 401 U.S. 985 (1971), quoted with approval from Kirk v. Board of Regents, 273 Cal.App.2d 430, 440, 78 Cal.Rptr. 260, 266-267 (1969), appeal dismissed, 396 U.S. 554 (1970) (emphasis added):
>
> > While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health* of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not involve similar risks . . . . Charging higher tuition fees to non-resident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.

Thus, it is evident that a statute, or regulation, which is under attack for infringing upon the right to interstate travel either by denying new residents the same benefits long term residents enjoy (durational residency requirements) or by treating non-residents less leniently than residents (residency requirements), the applicable standard for testing constitutionality in the absence of some "immediate and pressing need for preservation of life and health," is

whether or not the provision rationally furthers a legitimate state purpose or interest.

The District Court for the Northern District of Mississippi considered the question of the right to interstate travel in connection with a Mississippi statute requiring out-of-state attorneys relocating in Mississippi to take a bar examination, while graduates of Mississippi law schools and attorneys who had practiced in Mississippi for at least five years were exempted from the examination requirement. *Shenfield v. Prather*, 387 F.Supp. 676 (N.D. Miss. 1974) The Court held that "the ability to practice law without undergoing an examination of professional competence — is not sufficiently vital to infringe the plaintiffs' fundamental right to interstate travel." Id. at 686. "Moreover," the Court noted, "no evidence has been presented, and there is no basis for concluding that the Mississippi bar examination is apt to deter the migration of professional qualified attorneys into the state." Id. at 686.

II.

The Decision Of The Court Below Is Not In Conflict With The Decision Of The United States Court Of Appeals For The District Of Columbia In *Berger v. Board Of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975)

Berger involved an individual that had been practicing an unregulated profession since 1961. The profession became regulated in 1971, and Berger sought to obtain a license. The licensing authority ignored his experience in the field and denied his

application because of his failure to meet the threshold requirement of being a doctor of psychology. The Court held that such an irrebuttable presumption was unconstitutional.

Petitioner complains that the licensing procedure in the State of Florida creates a permanent, unconstitutional, irrebuttable presumption that petitioner is unfit for practicing medicine in Florida until the examination is taken and passed. Of course, this is not true, since §458.051, Florida Statutes, provides an alternate means of establishing qualification. Moreover petitioner's attempt to apply the legal concept of irrebuttable presumptions is misguided in this case. The concept of irrebuttable presumptions has been applied by the courts to describe situations in which particular classes of persons have been arbitrarily deprived of their rights solely on the basis of their membership in the class and have not been given an opportunity to show that the classification drawn is not reasonably related to the purpose of the legislation. *Vlandis v. Kline*, 412 U.S. 441 (1973) (irrebuttable presumption of nonresidency denying plaintiff the resident-rates for tuition); *Stanley v. Illinois*, 405 U.S. 642 (1972) (irrebuttable presumption that unwed fathers are unfit to have custody of their children); *Cleveland Board of Education v. LaFleur*, 414 U.S. 634 (1974) (irrebuttable presumption that pregnant women are unfit to teach after the fourth month of pregnancy); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (irrebuttable presumption of ineligibility of certain classes of households for foodstamps).

In *Berger*, the Court held that the plaintiff should be allowed the opportunity to prove his professional competency by taking an appropriate examination administered by the Board. Although the Court recognized the extensive experience of the plaintiff, it did not attempt to grant him a license on the basis of such. The Court never attempted to take away the Board's power to require the passing of an examination as a prerequisite to obtaining a license, but actually reinforced that power.

In the instant case, petitioner has not been deprived of any "right", and the "presumption" of incompetence may be overcome either by taking the examination or by proving certification by a national board. Petitioner simply refuses to apply to take such examination or to prove certification by a national board.

III.

The Decision Below Presents No Case Or Controversy And As Such There Remains Nothing To Be Resolved By This Court.

Petitioner does not allege that he has ever applied for Florida licensure either by applying to take the examination provided for in §458.09, Florida Statutes, or by applying for a license by endorsement under the provisions of §458.051, Florida Statutes; therefore, his contention that the refusal of the Board to grant him a license violates his constitutional rights presents merely a hypothetical question. This Court has held that no case or controversy is presented to a federal court when the litigation presents merely an abstract,

hypothetical or academic question, *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) reh.den. 300 U.S. 681, 157 S. Ct. 667, 81 L.Ed. 889, or when the plaintiff lacks standing to sue, *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). Petitioner, who has not alleged that he has applied or ever intends to apply for Florida license, has not demonstrated the requisite "personal stake in the outcome of the controversy" necessary to confer standing upon him. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

In order for a petition for writ of certiorari to be granted there must be special and important reasons. " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Since no case or controversy is presented by petitioner, the United States District Court lacked subject matter jurisdiction and the complaint was properly dismissed. *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

As such, the petition for writ of certiorari must be denied.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL I. SCHWARTZ
SLEPIN AND SCHWARTZ
Suite 201 Ellis Building
1311 Executive Center Drive
Tallahassee, Florida 32301
904-878-4161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been sent to Louis M. Jepeway, Jr., 2628 One Biscayne Tower, Miami, Florida 33131, on October ____, 1977.

MICHAEL I. SCHWARTZ